(29,751)

# SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1923.**

## No. 441.

COLLEGE POINT BOAT CORPORATION, APPELLANT,

*vs.*

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

INDEX.



JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 15, 1923.

[fol. 1] **COURT OF CLAIMS OF THE UNITED STATES**

No. 34220

COLLEGE POINT BOAT CORPORATION

vs.

THE UNITED STATES.

I. HISTORY OF PROCEEDINGS

On November 1, 1919, the plaintiff filed its original petition.

On January 2, 1920, a general traverse was filed under Rule 34.

On December 14, 1920, the case was argued and submitted by Messrs. Bynum E. Hinton, for the plaintiff, and by Wilfred Hearn, for the defendant.

On April 4, 1921, the court filed findings of fact and conclusion of law and entered judgment for plaintiff in the sum of $20,112.42, with an opinion by Booth, J., and a dissenting opinion by Graham, J.

On May 27, 1921, the plaintiff filed a motion for a new trial.

On October 17, 1921, the plaintiff's motion for a new trial was argued and submitted.

On October 24, 1921, the plaintiff's motion for a new trial was overruled by the court.

[fol. 2] IN THE COURT OF CLAIMS

On December 19, 1921, the court, of its own motion, filed an order vacating and setting aside order overruling plaintiff's motion for a new trial.

II. ORDER OF COURT VACATING JUDGMENT—Entered January 16, 1922

It is ordered by the court that the plaintiff's motion for a new trial be and the same is allowed.

It is further ordered that the judgment heretofore rendered be and the same is hereby vacated and set aside and that the findings of fact heretofore made be withdrawn.

The cause is remanded to the Calendar for further proceedings.

IN THE COURT OF CLAIMS

III. ARGUMENT AND SUBMISSION OF CASE

On April 3, 1923, this case was argued and submitted on merits by Mr. Bynum E. Hinton, for the plaintiff, and by Mr. Alex. H. McCormick, for defendant.

IN THE COURT OF CLAIMS

IV. PROCEEDINGS AFTER SUBMISSION OF CASE

On April 30, 1923, on motion made therefor, the plaintiff filed its Amended Petition. Said Amended Petition is as folllows:

[fol. 3] IN THE COURT OF CLAIMS

V. AMENDED PETITION—Filed April 30, 1923

To the Honorable the Justices of the Court of Claims:

1. The claimant, the College Point Boat Corporation, a corporation organized and existing under the laws of the State of New York, respectfully represents to the court as follows:

2. Under date of September 13, 1918, the Navy Department, pursuant to public advertisement, received proposals for the furnishing of two thousand (2,000) collision mats in accordance with Navy specifications, and the claimant herein submitted its bid at said opening. The opening was declared canceled by the Navy Department and bids were again called for and opened September 17, 1918, at which time claimant again submitted its bid. This opening was [fol. 4] likewise canceled and another supplementary opening held October 7, 1918, at which time claimant again submitted its bid, and after the opening it was found the claimant, as on the previous openings, was the low bidder, being on the last opening about fifty-six thousand dollars ($56,000.00) lower than the next high bidder and about three hundred sixty-five thousand dollars ($365,000.00) lower than the third high bidder.

3. Claimant's bid being the lowest and satisfactory, the Navy Department thereafter, under date of October 16, 1918, awarded contract to claimant by the following telegram:

"103 NYMK 3 3 Govt

En Washington, D. C., Oct. 16.

College Point Boat Corpn.,
College Point, L. I.:

Award made you schedule fifty eight eighty seven and half class seven forty six bid B collision mats contract four twenty eight seventy seven.

McGowan, Paymaster Genl. Navy.

510 PM."

4. The claimant thereafter received confirmation of award in the following communication:

"Notice of Award

In reply refer to No. 42877.

Navy Department

Bureau of Supplies and Accounts

Washington, D. C.

No. 132. 16 October, 1918.

1. The following classes in your proposal for naval supplies, opened in this Bureau 17 September, 1918, are hereby awarded to you under contract No. 42877.

[fol. 5]

| Schedule number | Classes | To be delivered at Navy Yard | Remarks |
|---|---|---|---|
| 5887–1/2 C. & R. | 746 | F. O. B. freight terminals at Brooklyn, Phila., Norfolk, Charlestown. | Supplementary opening 7 October, 1918. For bid "B." |

2. Before proceeding with delivery please refer to the conditions of delivery in your retained copy of the proposal. If the proposal provides for delivery in a definite number of days and makes no reference to deliveries upon receipt of orders from a supply officer, you are authorized to proceed at once with the delivery of the material. However, if the proposal provides for deliveries as required over a certain period upon receipt of orders from a supply officer, you must not make delivery except as directed in such orders. If the specification directs inspection before shipment, the shipment must not be made until the material has been inspected and orders for shipment given by the inspecting officer, unless specifically authorized by the Bureau concerned. If the contract covers delivery f. o. b. works, the material must not be shipped except under orders from the inspecting officer and then only under Government bill of lading to be furnished by that officer. In such cases the contractor must not prepay transportation charges.

3. All correspondence regarding inspection should be addressed to the inspecting officer of the Bureau concerned if known; if not known, then to the Bureau concerned. The Bureau concerned is mentioned at the top of the front page of each schedule. Requests regarding inspection should refer to the contract, schedule, and class numbers.

4. If any matters are not understood, they may be referred to this Bureau for instructions.

5. A formal contract covering the above, and any other classes that may be awarded you later, and of which you will receive other 'Notices of Award,' will be forwarded in due course for execution.

[fol. 6] 6. Deliveries.—Unless otherwise directed in the specifications for the class concerned, each case, crate, barrel, plate, package, etc., that may be shipped or delivered under this contract must be plainly stenciled, marked, or securely tagged by you, stating the contractor's name, contract number, the class, requisition, and item numbers—as given in the margin on each class of the schedule—and addressed to the 'Supply Officer, Navy Yard' (as above designated).

7. Shipping Memoranda.—Each delivery must be accompanied by truckman's receipts, bills of lading, or shipping invoices, in duplicate, giving name of dealer, number of contract, and class number, and number of requisition and name of Bureau, and a full statement of quantities, weights, packages, etc. Duplicate dealers' bills, giving the same identifying information, including prices, etc., and rendered separately for each class and for each requisition under a class when it embraces more than one requisition, must also be rendered to the supply officer of the yard concerned prior to or at the time of each delivery. The original must contain the following signed statement: 'Certified correct and just, payments not received.' This will expedite payments.

8. The above instructions and those on the back hereof must be carefully followed to avoid delay upon delivery. Supply officers will report each instance where these directions are not complied with; contractors should therefore give particular attention to the requirements of the last two paragraphs.

Respectfully, Samuel McGowan, Paymaster General of the Navy. H. R.

College Point Boat Corpn., College Point, N. Y.

Unless rerated by express order in writing by the Priorities Committte of the War Industries Board, this order is by authority of said Priorities Committee rated as Class A-5, and its execution shall take precedence over all your orders and work of a lower classification to the extent necessary to insure delivery according to the date specified [fol. 7] herein, as prescribed by Circular #4, issued by the Priorities Division of the War Industries Board, of date July 1, 1918, and all amendments thereto.

G. A. Peacock.

By direction of the Paymaster General."

384.

5. Thereafter, on October 25, 1918, formal contract No. 42877, was executed, together with bond in the penal sum of $64,200.00, by the terms of which contract and bond the contractor bound himself, with approved sureties, to deliver two thousand (2,000) collision mats

(1,000 9x9 ft. and 1,000 12x12 ft.) in accordance with the Navy specifications within two hundred and forty days (240) after the date of contract, and the Navy agreed to pay the contractor the total sum of six hundred forty-one thousand two hundred dollars ($641,-200.00), certified copy of which contract and bond is attached hereto and marked Exhibit A.

[fol. 8] 6. Thereafter the claimant received the following communication from the Navy:

"In reply refer to
No. C-42877.
F. C. F.:E. M.

United States Navy,

Fleet Supply Base,

29th Street and 3rd Avenue,

South Brooklyn, New York

Supply Department

5 November, 1918.

College Point Boat Corp.,
College Point, L. I.

GENTLEMEN:

Referring to Contract 42877, which has been awarded you, covering delivery at various points, of collision mats, you are informed that sixty mats 6′x6′, sixty 9′x9′ and forty 12′x12′, are for the Fleet Supply Base.

It is requested that the earliest possible delivery be made.

The Supply Officer, Per F. C. F."

[fol. 9] 7. The Inspection Bureau of the Navy advised the contractor in two communications as follows:

"Inspection General.

Navy Department,

Bureau of Construction and Repair,

Washington, D. C.

Nov. 8, 1918. Ba.

Refer to No. C42877-(S).

To Superintending Constructor, U. S. N., New York:

Subject:

Material—Collision mats with fitting.
Contract—42877, order.
Schedule—5887-½, requisition.

Classes—746.
Items—1 and 2 intended for various Navy Yards.
Contractors: Name, College Point Boat Corp. Address: College Point, N. Y.
Subcontractors: Name, —— ——.
To be inspected at the contractors' works.
Address: College Point, N. Y.
*works. Address: College Point, N. Y.*

Enclosure, herewith:
(A) Two copies of contract 42877.

1. Please conduct, or arrange for the inspection of the material above described, making shipment under Government bills of lading if so indicated in the enclosures. Please notify the contractors and subcontractors that you will conduct this inspection, and that you will furnish or have furnished the necessary Government bills of lading in case of any f. o. b. works deliveries, unless shipment is otherwise provided for in the contract or order. Any special instructions relative to this inspection will be found in the enclosures.

2. The date of this contract is October 25, 1918.

[fol. 10] 3. The contractors have been furnished copies of this authorization of inspection so that they may consider this sufficient notice to conduct any further correspondence relative to the same direct with your office in order to avoid delays in either the inspection or delivery of the material.

(Signed) R. P. Schlabach.

By direction—
Copy to:

Superintending Constructor, U. S. N., 411 5th Ave., New York, N. Y.; Supply Officers, Brooklyn, Philadelphia, Norfolk, Boston; College Point Boat Corp., College Point, N. Y.

Superintending Constructor

For United States Navy,

411 Fifth Ave., New York City

Mention in Reply: Dy-Sd. 11 Nov. 1918.
From: Superintending Constructor, U. S. N.
To: College Point Boat Corp., College Point, Long Island, N. Y.
Subject: Collision mats with fitting; inspection of.
Reference: Navy contract No. 42877, schedule No. 5887½, class No. 746, items 1 and 2, dated October 25, 1918.
1. This office will inspect the above material.

2. It is requested that notice be given in writing, at least 24 hours in advance, when this material will be ready for inspection, stating in detail the location and street address.

3. Material manufactured under this order must not be shipped until duly authorized by the inspector. Shipment made without such authority will be at the risk of the manufacturer as to inspection and acceptance at destination.

4. If you sublet the whole or any portion of this contract or order, or purchase any material from other manufacturers or dealers, please state on every such order the Navy specification with which the ma-
[fol. 11] terial must comply and that inspection of same will be made by this office at place of manufacture. When you place such order, please furnish this office with four extra copies of same, omitting price.

Copy to Supply Officers, Navy Yds. Brooklyn, Philadelphia, Norfolk, Boston.

S. A. Bailey, By direction."

8. Immediately upon receipt of notice of award contractor had arranged and enlarged its plant facilities so that it could promptly take up production work under this contract, along with its work then being done for the Navy under Navy order N-3990, and Norfolk Yard contract No. 1384, which two latter named contracts covered quantities of collision mats of similar kind and size as called for under the contract now in question.

9. The contractor, also in the performance of the obligation on its part assumed, proceeded and placed orders for required materials as follows:

| | |
|---|---|
| 7,000 lbs. twine @ $.69 per lb | $4,830.00 |
| 2,000 lbs. machine thread @ $.95 | 1,900.00 |
| 120,840 lbs. manila rope @ $.31 | 37,460.40 |
| 22,925 lbs. old rope @ $.095 per lb., 3,450 lbs. old rope @ $.10 per lb., 384 lbs. old rope @ $.12 per lb | 2,568.96 |
| 280,000 ft. wire rope @ $7.50 per 100 ft | 21,000.00 |
| 280,000 ft. wire rope @ $10.05 per 100 ft | 28,140.00 |
| 8,000 pcs. 3" thimbles @ $.115 per pc | 920.00 |
| 4,000 pcs. 5/8" thimbles @ $.0825 per pc | 330.00 |
| 4,000 pcs. 1 3/8" thimbles @ $.378 per pc | 1,512.00 |
| 4,000 pcs. 1/2" shackles @ $.37 per pc | 1,480.00 |
| 4,000 pcs. 7/8" shackles @ $.85 per pc | 3,400.00 |
| 448,000 lbs. 3/8" chain @ $10.95 per 100 lbs | 49,056.00 |
| 1,068 lbs. wax @ $.43 per lb | 459.24 |
| | $153,056.60 |

[fol. 12] 10. The following quantities of material were still to be ordered:

| | |
|---|---|
| 480,000 lbs. manila rope @ $.31 per lb | $148,800.00 |
| 130,241 lbs. "old" rope @ $.10 per lb | 13,024.10 |
| 932 lbs. wax @ $.43 per lb | 400.76 |
| | $162,224.86 |

11. The contractor continued the performance of the contract without any defalcations whatsoever on its part until further performance was prevented by the Navy Department; and was at all times ready and willing to perform; and in fact the contractor urged the Navy Department to permit it to perform, but the Navy Department refused to allow the contractor to complete the contract, and thereupon instructed the contractor to cancel all its commitment orders, which had not been delivered, and the cancellation of which without loss was possible.

12. Thereupon, pursuant to the Navy's instructions, the contractor cancelled all commitments, which had not been delivered, and the cancellation of which without loss was possible, and incurred no further expense for material obligations. Such material as could not be canceled the Navy purchased from the contractor at the actual cost price to it, which purchase was covered by supplementary contracts 42,877, dated the 10th day of February, 1919, and the 30th day of June, 1919, certified copies of which contracts are attached as Exhibit A.

13. By reason of the foregoing the contractor has been damaged in the sum of one hundred ninety-nine thousand two hundred fifty-nine dollars and nineteen cents ($199,259.19) and interest at rate of 6% per annum from December 6, 1918, as follows:

| | | |
|---|---|---|
| [fol. 13] Total contract price | | $641,200.00 |
| Total costs saved by reason of cancellation and the Navy's purchase of materials: | | |
| (*a*) Labor | $81,110.00 | |
| (*b*) Material | 315,281.46 | |
| (*c*) Direct overhead | 37,899.35 | |
| (*d*) Freight charges | 7,650.00 | |
| | | 441,940.81 |
| Amount due claimant | | $199,259.19 |

and interest at rate of 6% per annum from December 6, 1918.

14. The claimant is the only person owning or interested in the claim above set forth, and no assignment or transfer of the same or any part thereof or interest therein has been made. The claimant is justly entitled to receive and recover from the United States for and on account of said damage the sum of one hundred ninety-nine thousand two hundred fifty-nine dollars and nineteen cents ($199,259.19) and interest at rate of 6% per annum from December 6, 1918.

15. The claimant has made due demand upon the United States for the payment of said sum, but the said sum has not been paid nor any part thereof. The claimant has always borne true allegiance to the Government of the United States and has not in any way aided, abetted or given encouragement to rebellion against it.

Wherefore the claimant prays for judgment against the United States in the sum of one hundred ninety-nine thousand two hundred fifty-nine dollars and nineteen cents ($199,259.19) and interest at rate of 6% per annum from December 6, 1918, and for such further relief as this honorable court may grant both at law and in equity in the premises.

College Point Boat Corporation. Bynum E. Hinton, Attorney for Claimant.

[fol. 14] DISTRICT OF COLUMBIA, *ss:*

Bynum E. Hinton being first duly sworn according to law, deposes and says that he is the attorney of the College Point Boat Corporation, and that he has read over the foregoing amended petition and the facts and matters set forth therein are true to the best of his information and belief.

Bynum E. Hinton.

Subscribed and sworn to before me this 28th day of April, 1923. (Seal.) Julian C. Hammack, Notary Public, D. C.

EXHIBIT "A" TO AMENDED COMPLAINT

Contract No. 42877

Opening, 17 Sept., 1918.

[All correspondence relative to inspections, deliveries, damages, payments, etc., hereon, must refer to the above contract number and the number of the class concerned.]

This contract, of two parts, made and concluded this 25 day of October, A. D. 1918, by and between College Point Boat Corp., of College Point, in the State of N. Y., party of the first part, and the United States, by the Paymaster General United States Navy (Chief of the Bureau of Supplies and Accounts), acting under the direction of the Secretary of the Navy, party of the second part, witnesseth, that, for and in consideration of the payments hereinafter specified, the party of the first part, for itself and its personal and legal representatives, doth hereby covenant and agree to and with the party of the second part, as follows, viz.:

[fol. 15] 1. That it, the said party of the first part, will furnish and deliver, at its own risk and expense, the following classes of articles, at the place and within the time stated for each class, and at the price set opposite each item as appended hereto, respectively:

Full name of bidder.....
Address .....

Class 746: (Bu. Req'n 257, Construction and Repair, App'n —— "Construction and Repair 1919," schedule 5887½.
F. o. b. freight terminals at Charlestown, Brooklyn, Philadelphia and Portsmouth.

To be delivered as follows: First delivery of 10 mats within 40 days after date of contract or bureau order, or receipt of canvas from the Government subsequent deliveries at the rate of 10 daily thereafter, and complete delivery within 240 days after date of contract or bureau order.

Bidders must insert in the above blank spaces the number and time of the first delivery, rate of subsequent deliveries and time of completion of contract.

Other conditions being nearly equal, the rate and time of delivery will be considered in making award.

The material is urgently needed and the earliest possible delivery is requested.

Liquidated damages for delayed delivery provided by Form A will not apply to this bid or any contract based on this schedule.

Prices quoted are to be for delivery at the place named.

Bids are desired as follows:

Bid A. For the finished material, the contractor to furnish all the material.

Bid B. For the finished material, the Government to furnish the canvas, contractor to furnish all other material.

[fol. 16] Stock Classification No. 12

Collision mats complete with fitting as follows:

| Item No. | Bid A | | Bid B | |
|---|---|---|---|---|
| | Unit price | Total | Unit price | Total |
| 1. 1,000 12 by 12 feet stock No. 23M19, each ..... | ... | ... | $335.00 | $335,000.00 |
| 2. 1,000 9 by 9 feet stock No. 23M25, each... | ... | ... | 306.20 | 306,200.00 |
| Total class 746.... | ... | ... | ..... | $641,200.00 |

NOTE.—The supply officers at the yards concerned are requested to make prompt payment upon receipt of contractor's invoice provided material is satisfactory.

Specifications

The above collision mats to be in strict accordance with "Specifications 12-M-1c," issued by the Navy Department October 21, 1917, copies of which may be obtained upon application to the supply offi-

cer, Navy Yard, Brooklyn, N. Y., or to the Bureau of Supplies and Accounts.

The above collision mats to be delivered as follows:

| To freight terminals at | Item 1 | Item 2 |
|---|---|---|
| Boston (Charlestown) Mass | 150 | 150 |
| Brooklyn, N. Y | 300 | 300 |
| Philadelphia, Penna | 250 | 250 |
| Norfolk (Portsmouth), Va | 300 | 300 |

Bid A. Bidders must state on the blank lines below the amount of money *he is* figuring for canvas.

[fol. 17] Canvas figured at ..... per yard
Cost of total amount canvas required .....

Bid B. Bidders must state the quantity and width of number- 1 and 2 canvas required in the manufacture of the collision mats.

| Item | Number 1 | | Number 2 | |
|---|---|---|---|---|
| 1. | Number of yards | 28 | Number of yards | 28 |
| | Width | 22″ | Width | 22″ |
| 2. | Number of yards | 17½ | Number of yards | 17½ |
| | Width | 22″ | Width | 22″ |

Name of factory to which canvas is to be delivered, College Point Boat Corporation.

Address, College Point, New York.

Date delivery of canvas will be required, 30 days.

Note for Bidders.—It is necessary that the above information be furnished under Bid B.

All scrap produced from material furnished by the Government remains the property of the Government.

The contractor assumes full responsibility for the care, segregation, proper stowage and loading of the scrap f. o. b. cars when directed by the Navy; loading and shipping instructions to be given as soon as practical after the contractor advises on accumulation enough to warrant shipment.

Metals or other materials.—Specify exact quantity, weight or yardage.

In view of the existing car shortage conditions and the unusual volume of freight to be handled, it is necessary that cars be loaded to their full cubic capacity, or that the weight be equivalent to 110 per cent of the capacity of the car whenever practicable and also that [fol. 18] cars be loaded with the least possible delay. Close attention to this matter on the part of all concerned will materialy assist in relieving the situation and the Navy expects full co-operation in all cases where orders placed involve a carload or more.

Report of Shipments.—Within 48 hours after shipment, contractor will furnish to the inspector a report of material shipped. In case the inspection is being conducted by a branch inspection office this report will be furnished to that branch office, unless otherwise directed.

Name of Manufacturer, College Point Boat Corporation.
Address, College Point, New York.
Exact location of manufactured stock.....

Note for Bidders.—It is necessary that the above information be furnished. For general conditions see last page of this schedule.

*General Conditions Governing this Schedule*

Liquidated Damages

1. Liquidated damages for delayed delivery provided by Form A will not apply to this bid or any contract based on this schedule.

Information About Location of Material

2. Bidders must state on the blank lines under each class the name and address of the manufacturer of the material they propose to furnish. In case the manufacturer is the bidder, the exact address of the manufacturing establishment is required and not the office address. If the material is to be supplied from stock and not specially manufactured, the exact location where the finished material is in stock must be stated.

[fol. 19] Stock Numbers Do Not Concern Bidders

3. When stock numbers are mentioned, they are for the information of the supply officer of the navy yard only and do not concern the bidders.

Inspection

4. Inspection to be at Navy Yard or place of manufacture, as directed by the bureau concerned.

If inspection is to be at Navy Yard only, Government to bear expense of inspection, except for value of samples used in case of rejection of material.

If inspection is to be made at place of manufacture, the following provisions will apply:

(*a*) The cost of inspection, when not otherwise stated, is to be paid by the Government, but in case it is necessary to handle the material and prepare test specimens to determine quality, the expense incurred thereby shall be paid by the contractor.

(*b*) Where unauthorized shipment is made before Government inspection, the Government reserves the right to return the material to the place of manufacture at contractor's expense for inspection.

(*c*) Where useless trips of inspector are caused by incorrect information given by contractor, the Government reserves the right to charge expense of said trips to said contractor and to deny inspection at the plant.

(*d*) If the contract is sublet, the contractor and subcontractor shall furnish the inspector representing the bureau concerned in their [fol. 20] district quadruplicate copies of all orders placed with the manufacturers for materials, providing specifications, and stating when possible the purpose of each item ordered. Such orders shall be considered suborders and contain the number of original contract. In case material requires special treatment after leaving the manufacturer's works, other than machining, such orders must state explicitly the nature of the treatment.

Bidder to State Whether Government Aid is Needed to Secure Delivery of Material.

5. If the bidder will require a priority certificate or aid in securing additional equipment in order to make the promised deliveries, the facts will be stated in the proposal.

United States Contracts Must Have Preference

6. The bidder, if successful, will be required to give the performance of the contract precedence over all other contracts, except prior contracts involving the preparation of war material for the United States or allies of the United States, unless specifically superseded by the priority certificate.

Changes of Drawings and Specifications May be Made by the Government with Adequate Compensation

7. It is understood that the Government, in case of neces-ity, may by a written notice to the successful bidder at any time make a reasonable change in the drawings and specifications or provisions in this contract. If any changes are made involving additional expense or reduction in labor and material, it is understood that a mutually satisfactory adjustment will be made. Any claim caused in this way must be based upon an order in writing.

[fol. 21] 2. It is hereby mutually and expressly covenanted and agreed by and between the parties hereto that the article or articles to be furnished or services to be performed under this contract shall conform in all respects to the requirements of the specifications hereunto annexed, which specifications, the "Instructions, Deliveries, and Conditions," printed on the proposal of said party of the first part, shall be deemed and taken as forming a part of this contract with like operation and effect as if the same were incorporated herein; and in any case where the specifications do not explicitly provide to the contrary, all workmanship and materials entering into the manufacture or construction of any article or articles under this con-

tract, shall be of the very best commercial quality and manufacture; and said article, articles, or services shall upon delivery or completion, be subject to inspection and examination by the officer or officers authorized by the said party of the second part to inspect and examine the same; and no article furnished or services performed under this contract shall be accepted until it or they shall have been inspected and approved by such officer or officers; and any of said articles not so approved shall be removed by the said party of the first part at its own expense, and within ten days after notification.

3. It is further covenanted and agreed, as aforesaid, that time is an essential element of this contract, and that, if the said party of the first part shall fail to make delivery of any or all of the articles or materials or to perform any or all of the services herein contracted for, in conformity with the conditions and requirements of the contract, and within the time or times prescribed, the said party of the second part will be damaged thereby; and the amount of said damages is hereby fixed and agreed to in advance, as liquidated damages, and not as penalty, and the said party of the second part shall make deductions from the contract price accordingly, as follows, viz:

[fol. 22] For each day's delay, Sundays and holidays excepted, until satisfactory delivery or performance shall have been made, or until such time as the party of the second part may procure the same as hereinafter provided, at the rate of one-twentieth of 1 per cent of the contract price, the deductions, however, not to exceed in any case 10 per cent of the stipulated value of the articles or materials not so delivered, or of the services not so performed; rejection of deliveries or performance not to be considered as waiving deductions: Provided, That no liquidated damages shall be deducted for such period, after the expiration of the time or times prescribed for delivery or performance, as, in the judgment of the party of the second part, shall equal the time that, either in the beginning or in the prosecution of the deliveries or services contracted for, shall have been lost on account of any cause for which the United States is responsible, or on account of strikes, riots, fire, or other disaster, delays in transit or delivery on the part of transportation companies, or any other circumstances beyond the control of the contractor, but such circumstances shall not be deemed to include delays on the part of subcontractors in furnishing materials when such delays arise from causes other than those herein specified: And provided further, That the question whether delays are due to causes herein specified shall be determined by said party of the second part.

4. It is further covenanted and agreed that if the said party of the first part shall fail in any respect to perform the contract the same may, at the option of the United States, be declared null and void, without prejudice to the right of the United States to recover for defaults therein or violations thereof, or the said party of the second part may purchase or procure in such manner and from such person or persons as he deems proper, paying such price therefor as may be necessary in order to procure the same, such of said articles or

materials of the kind specified as near as practicable, or procure the [fol. 23] performance of such services, as the said party of the first part shall fail to deliver or perform as required, and may demand and recover from the said party of the first part the difference between the price so paid therefor and the price stipulated in the contract; and the amount of such difference shall be paid by the said party of the first part to the said party of the second part on demand.

5. It is further covenanted and agreed that the said party of the first part shall indemnify the United States, and all persons acting under them, for all liability on account of any patent rights granted by the United States that may be affected by the adoption or use of the articles herein contracted for.

6. It is further covenanted and agreed that in carrying out the provisions of the contract no person shall be employed who is undergoing sentence of imprisonment at hard labor which has been imposed by a court of the United States, or of any State, Territory, or municipality having criminal jurisdiction; that the contract is upon the express condition that no member of or delegate to Congress, nor any person belonging to or employed in the naval service is, or shall be, admitted to any share or part therein or to any benefit to arise therefrom, except as a member of a corporation; and that any transfer of the contract, or of any interest therein, to any person or party by the said party of the first part shall annul the same, so far as the United States is concerned.

7. And this contract further witnesseth, That the United States, party of the second part, in consideration of the foregoing stipulations, do hereby covenant and agree, to and with the party of the first part, as follows, viz:

That upon the presentation of the customary bills, and the proper evidence of the delivery, inspection, and acceptance of the said article, articles, or services, and within ten days after such evidence shall [fol. 24] have been filed in the Bureau of Supplies and Accounts, there shall be paid to the said College Point Boat Corp. or to its order, by the Navy Pay Officer, at Washington, D. C. (Disbursing Officer), the sum of six hundred forty-one thousand two hundred ($641,200.00) dollars, or the sum found due under this contract: Provided, however, That no payments shall be made on any one of said classes until all the articles or services embraced in such class shall have been delivered or performed and accepted, except at the option of the party of the second part.

In witness whereof the said parties hereto have hereunto set their hands and seals the day and year first above written.

(See note.)

The College Point Boat Corporation. [L. S.] Chas. T. Diste, Pres. [L. S.] H. W. Schroeder, Treas. [L. S.] S. McGowan, [L. S.] Paymaster General U. S. Navy, Chief of the Bureau of Supplies and Accounts. Signed and sealed in the presence of M. Wolf, C. E. Carroll, as to party of the first part. E. W. Smith, as to Paymaster General U. S. Navy.

NOTE.—Contracts and bonds signed by a firm must be duly signed in the firm name and by each member of the firm, each signature to be sealed with wax or wafer seal. Contracts signed by a corporation shall be signed with the corporate name, by an officer thereof or a duly authorized agent, and sealed with the corporate seal; evidence of authority for signature to be appended.

[fol. 32] NOTE TO SURETY COMPANY.—This agreement must be executed by the home office of the surety company unless full authority to modify bonds previously executed has been conferred on the agent or agents, in which event such special authority must be attached to this agreement.

## Bond

Know all men by these presents, That we, The College Point Point Boat Corporation, of College Joint, States of New York, as principal, and United States Guarantee Company, a corporation organized under the laws of the State of New York, and having executed offices in the City of New York and State of New York, and Chicago Bonding Company and Insurance Company, a corporation organized under the laws of the State of Illinois, and having executive offices in the city of Jersey City and State of New Jersey, as sureties, are held and firmly bound unto the Secretary of the Navy, the principal in the full and just penal sum of sixty-four thousand two hundred dollars ($64,200.00), lawful money of the United States, jointly and severally with each surety as herein specified, and the United States Guarantee Company jointly and severally with said principal in the sum of thirty-two thousand one hundred dollars ($32,100.00) of said penal sum and no more; and the said Chicago Bonding and Insurance Company jointly and severally with said principal in the sum of thirty-two thousand one hundred dollars ($32,100.00) of said penal sum and no more; for the payment of which respective sums, well and truly to be made to the Secretary of the Navy, we bind ourselves, our heirs, executors, administrators, successors, and assigns, in the manner and in the respective sums hereinbefore set forth, firmly by these presents.

The obligors herein expressly agree that, for the purpose of allowing a joint action against any or all of them, and for that purpose only, this bond shall be treated as the joint and several as well as [fol. 33] the several obligation of each of the obligors.

Sealed with our seals and dated this 25th day of October, 1918.

## Conditions

The conditions of the above bond are such, that if the above-bounden, The College Point Boat Corporation, its successors or assigns, shall well and truly, and in a satisfactory manner, fulfill the contract hereto annexed, and deliver the articles or perform the services mentioned in the annexed schedule within the time specified, and to the satisfaction of the said chief of the Bureau of Supplies

and Accounts, then this obligation to be void and of no effect; otherwise to remain in full force and virtue.

The College Point Boat Corporation, By Chas. A. Diste, President. H. W. Schroeder, Treasurer. United States Guarantee Company, By Daniel J. Tompkins, President. Ward E. Flaxington, Assistant Secretary. Chicago Bonding and Insurance Company, By Jas. H. Hughes, Att'y-in-Fact. Signed and sealed in the presence of W. H. Young. W. H. Young. George C. Peterson. Harry Gordon.

[fol. 25] Form N. S. A. 535-A

*Supplementary Agreement*

Contract Number 42877

Date of Opening, 17 September, 1918.

All correspondence relative to inspection, delivery, payment, etc., hereunder must refer to this supplementary agreement, giving the contract number and date and the number of the class concerned.

This supplementary agreement, entered into this 10th day of February, 1919, by and between College Point Boat Corporation, 30 Church Street, New York City, party of the first part, and the United States, by the Paymaster General of the Navy (Chief of the Bureau of Supplies and Accounts), acting under the direction of the Secretary of the Navy, party of the second part, amends the terms of Contract No. 42877, dated 25 October, 1919, to provide as follows:

Whereas, by the terms of the original contract, the contractor was obligated to furnish 2,000 collision mats for the Navy, and

Whereas, by the reasons of the changed conditions of the country due to the signing of the Armistice, it has been found necessary in the public interest to consider cancelling the entire contract, and

Whereas, the contractor has purchased certain quantities of material for this contract, which it has become necessary for the Navy to take from the contractor,

Therefore, the following material is taken by the Navy, to wit:

[fol. 26] Material on hand tagged to be returned:

| | |
|---|---|
| 50,537 lbs. 4″ manila rope, at $.31 lb..... | $15,666.47 |
| 24,454 lbs. 3″ manila rope, at $.31 lb..... | 7,580.74 |

Above f. o. b. contractor's plant.

| | |
|---|---|
| 13,833 lbs. old rope, 4,225 at $.11 lb..... | 464.75 |
| 3,463 at $.12 lb..... | 415.56 |
| 6,145 at $.10 lb..... | 614.50 |
| Freight on old rope..... | 24.23 |
| Cartage from depot, at $2.00 per ton..... | 13.80 |
| 176 lbs. #10 ply S. F. machine thread, at $1.00 per lb. | 176.00 |

Above f. o. b. contractor's plant.

| | |
|---|---|
| 1,492 lbs. 6-ply sail twine, at $.69 per lb..... | 1,029.48 |
| F. o. b. Moodus, Connecticut. | |
| Freight on twine ..... | 8.07 |
| Cartage on above ..... | 1.49 |
| 925 lbs. beeswax, at $.43 per lb..... | 397.75 |
| Carted by contractor's truck. | |
| 200 lbs. ½" galv. shackles, at $.3561..... | 71.23 |
| 200 lbs. ⅞" galv. shackles, at $.8181 each ..... | 163.62 |
| Carted by contractor's truck. | |
| 35,000 ft. 12 x 6 x 12 x 7 steel rope, at $.09-2½-10-5% | 2,626.86 |
| Cartage from depot on 11,384, at $2.00 per ton..... | 11.38 |
| | $29,265.93 |

Material used on contract #1384 for Norfolk from material for contract #42877:

| | |
|---|---|
| 102 lbs. beeswax, at $.43 ..... | 43.86 |
| 12,931 lbs. old rope, at $.10..... | 1,293.10 |
| Freight on old rope..... | 21.98 |
| Cartage on old rope from depot, at $2.00 per ton.... | 12.93 |
| 43,317 lbs. 4" circ. manila at $.31..... | 13,428.27 |
| Total..... | $14,800.14 |
| Grand total ..... | $44,066.07 |

[fol. 27] Therefore, the purpose of this supplementary contract is to provide payment to the contractor in the sum of $44,066.07, which price is the cost price to the contractor of all the above material.

Shipping instructions to be subsequently given concerning the quantity of material called for above and it is distinctly understood that the Government reserves the right to recover any payments improperly made under this supplementary contract and when delivery is finally accepted by the Navy to make appropriate deductions for such quantities of materials as do not show up on final acceptance of this material.

After final acceptance, shipment will be made on Government bill of lading.

Public bills covering dealers' invoices for material as called for in this supplementary contract are to be prepared by the Bureau of Supplies and Accounts, Navy Department, Washington, D. C., when payment will be made.

In witness whereof the said patries hereto have hereunto set their hands and seals the day and year first above written.
(See note.)

College Point Boat Corp. [L. S.] W. H. Young, V. Pres. [L. S.] H. M. Schroeder, Treas. [L. S.] S. McGowan, [L. S.] Paymaster General U. S. Navy, Chief of the Bureau of Supplies and Accounts. Signed and sealed in the presence of M. C. Johnson, As to Party of the First Part. E. W. Smith, As to Paymaster General U. S. Navy.

[fol. 28] NOTE.—Contracts and bonds signed by a firm must be duly signed in the firm name and by each member of the firm, each signature to be sealed with wax or wafer seal. Contracts signed by a corporation shall be signed with the corporate name, by an officer thereof or a duly authorized agent, and sealed with the corporate seal; evidence of authority for signature to be appended.

We, United States Guarantee Company, and the Chicago Bonding & Insurance Co., as surety for College Point Boat Corporation, hereby concur in the above amendment to Contract No. 42877 as applying to bond of thirty-two thousand one hundred dollars $32,100) each, executed by us under date of October 25, 1918, and agree to continue bond in force.

United States Guarantee Company. Daniel J. Tompkins, Pres. [L. S.] Chicago Bonding & Insurance Co. [L. S.] Jas. H. Hughes, Atty-in-Fact. [L. S.] Witnessed by Ward E. Flaxington, Asst. Sec. Harry J. Doyle.

NOTE TO SURETY COMPANY.—This agreement must be ratified by the home office of Surety Company unless full powers to modify bonds entered into have been conferred on the agent.

[fol. 29] Form N. S. A. 535-A

*Supplementary Agreement*

Contract Number 42877

Date of Opening, 17 Sept., 1918.

All correspondence relative to inspection, delivery, payment, etc., hereunder must refer to this supplementary agreement, giving the contract number and date and the number of the class concerned.

This supplementary agreement, entered into this 30th day of June, 1919, by and between College Point Boat Corporation, 30 Church Street, New York N. Y., party of the first part, and the United States, by the Paymaster General of the Navy (Chief of the Bureau of Supplies and Accounts), acting under the direction of the Secretary of the Navy, party of the second part, amends the terms of Contract No. 42877, dated 25 October, 1918, to provide as follows:

Schedule 5887½ class 746, requisition 257 C and R, appropriation Construction and Repair, 1919.

Whereas, by the terms of original contract 42877 the College Point Boat Corporation was obligated to furnish 2,000 collision mats for the Navy, and

Whereas, by reason of the changed conditions of the country, due to the signing of the Armistice, it has been found necessary in the public interest to consider cancelling the entire contract, and

Whereas, the contracting company has ordered certain materials hereinafter specified from the Hazard Manufacturing Company, which material has been delivered to the Navy Yard, Boston.

Now, therefore, it is hereby agreed that the Navy will pay for the material so delivered by the Hazard Manufacturing Company $10,225.60, in accordance with the following statement:

| | |
|---|---|
| [fol. 30] 50,000 ft. ½-inch 3 x 12 galv. plow, at $10.05 | $5,025.00 |
| 26,003 lbs. .034 galv. steel wire, at $.20..... | 5,200.60 |
| Total ..... | $10,225.60 |

In consideration of the payment herein agreed to be made, the College Point Boat Corporation does hereby for itself, its successors and assigns remise, release, quitclaim and forever discharge the Navy from any liability whatsoever, growing out of the claim of the Hazard Manufacturing Company or of any other subcontractor, arising out of Contract 42877, or by reason of the termination of the same, saving, however, to the College Point Boat Corporation the right to pursue any remedy it may have in its own right, arising under Contract 42877 or by reason of the termination of the same, such rights arising not being connected with or growing out of the claims of any subcontractor. Public bills covering dealers' invoices for material as called for in this supplementary contract will be prepared by the Bureau of Supplies and Accounts, Navy Department, Washington, D. C., upon receipt of contractor's invoices with a certificate thereon by the naval inspector, or the supply officer, Navy Yard, Boston, Mass., that the material covered by such invoices has actually been received at Boston.

All other conditions of the original Contract No. 42877 to remain as originally specified.

In witness whereof the said parties hereto have hereunto set their hands and seals the day and year first above written.

(See note.)

College Point Boat Corporation. W. H. Young, Vice Pres., [L. S.] Party of the First part. H. W. Schroeder, G. M., [L. S.] Party of the First Part. C. J. Peoples, [L. S.] Acting Paymaster General of the Navy, Chief of the Bu-
[fol. 31] reau of Supplies and Accounts. Signed and sealed in the presence of Carl S. Van Name, Witness to Signature of Party of the First Part. E. W. Smith, Witness to Signature of Paymaster General of the Navy.

NOTE.—Contracts and bonds signed by a firm must be duly signed in the firm name and by each member of the firm, each signature to be sealed with wax or wafer seal. Contracts signed by a corporation shall be signed with the corporate name, by an officer thereof or a duly authorized agent, and sealed with the corporate seal; evidence of authority for signature to be appended.

We, United States Guarantee Company and Chicago Bonding & Ins. Co., as surety or sureties for the above-named contractor, hereby consent and agree this 16th day of July, 1919, to the amendments covered by the supplementary agreement relating to contract numbered as above and hereby expressly agree that our bond previously executed, guaranteeing the performance and fulfillment of the original contract, shall continue in full force and effect notwithstanding such amendments.

United States Guarantee Company. Daniel J. Tompkins, Pres. [L. S.] Chicago Bonding & Insurance Co. [L. S.] O. Roberts, Vice Pres. [L. S.] Witnessed by Ward E. Flaxington, Asst. Sec. E. R. Westerfield, Sec.

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[fol. 34] **FINDINGS OF FACT, CONCLUSION OF LAW AND OPINION OF THE COURT BY BOOTH, J., ENTERED MAY 21, 1923.**

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

FINDINGS OF FACT

I

The plaintiff, the College Point Boat Corporation, is a corporation duly incorporated and existing under the laws of the State of New York.

II

Under date of October 25, 1918, the plaintiff entered into a contract with the United States, represented by the Paymaster General of the Navy, to furnish the Navy Department, for a consideration of $641,200, two thousand collision mats, such mats being a part of the equipment for ships, and intended for use in stopping leaks in a ship's hull resulting from collision or otherwise. A copy of said contract, including the specifications for the work, is made a part of these findings of fact as Exhibit A thereto.

III

Pursuant to said contract the plaintiff placed orders for about $153,056.60 worth of the materials needed in the manufacture of

said mats, and proceeded with a rearrangement and enlargement of its plant, which was necessary to the performance of its contract. In placing said orders for materials the plaintiffs, where it could do so, reserved a right to cancel the orders in case its contract should be canceled by the Government.

IV

The canvass to be used in making the mats was to be furnished by the defendant. On or about December 3, 1918, the plaintiff verbally requested the defendant to furnish the canvas, and defendant's officers thereupon promised to expedite the furnishing of it, but at the same time requested and arranged for a conference with the plain- [fol. 35] tiff in the matter of the contract, to be held on December 6th following. At this conference the plaintiff was informed by defendant that on account of the signing of the armistice and the probably early termination of the war the mats called for by the contract would probably not be needed, and that the department therefore desired to negotiate for the cancellation of the contract. Also it was suggested by said officers that plaintiff stop operations for the performance of the contract and submit a proposition as to the basis upon which a cancellation of the contract would be satisfactory to it.

The said canvas for the mats was never furnished by the defendant, nor did the plaintiff again request that it be furnished.

V

Following said conference of December 6, 1918, and pursuant to defendants' said suggestion and request, the plaintiff stopped operations for the performance of said contract, and, under date of December 30, 1918, wrote the Navy Department as follows:

"Replying to your request as to on what basis we will accept cancellation or reduction in quantity of contract No. 42877 for 2,000 collision mats, aggregating $641,200, we submit the following proposition for your approval:

"We appreciate that the desire of the Navy Department is to cancel the contract completely by mutual agreement, without expenditure for articles for which at the present time it has no need. We also wish it understood that the natural aim of the College Point Boat Corporation is to complete the entire contract which was entered into in good faith to supply a need of the Navy Department at the time. Particularly since it has not only allotted a considerable time of its plant and organization to this contract to the exclusion of other opportunities, but has also made all preparations and engagements for performance so that its expenditures and profits are not conjectural, but are practically liquidated. Between those two widely divergent views the settlement must me made upon the fairest and most equitable terms to both parties to the contract.

"Two ways to come to an agreement present themselves, and have been particularly mentioned by you. (1) What reduction in num-

ber will permit the College Point Boat Corporation to reduce subcontracts accordingly, realize expenditures already made, keep their plant busy until it can be filled with other work and render possible making of a profit during the time now under contract equal to the profit which would have been realized by completing the entire amount contracted for. (2) To cancel as much as possible of the subcontracts for material, the Navy to accept at cost plus a reasonable charge for handling all materials now on hand, and to indemnify the College Point Boat Corporation by payment of liquidated damages covering expenditures made on account of the contract; and overhead and other expenses which must necessarily be made during the time for which the plant was retained for this contract; and which can not be alloted to anything else or otherwise recovered; and net profits which would have resulted from completion of the contract.

"Considering the first proposition, it can readily be seen that whatever reduction is made in the number of mats, the price remain-[fol. 36] ing the same, the return per mat as well as the total return will be reduced since the overhead charges will be apportioned over a smaller number of mats. This would lead to the alternatives of either increasing the unit price with reduction in quantity, or increasing the separate damages with reduction in quantity at an unchanged unit price. We believe after our recent discussion of the subject that neither of these alternatives would be satisfactory to the Navy, since it feels that it does not require any mats, and would only accept a small number at an unchanged price, in order to keep the employees from being thrown out of work suddenly. There is the further possibility of taking other remunerative work after a stated portion of the contract has run out, but a careful consideration shows no probability of any important gain from this source. The present capacity, created expressly for this contract, represents an increase of about six times over the former sail loft, which was of the proper size to care for normal business requirements. Our competitors all have shops of about that size, which seems to prove that normal commercial conditions will not produce enough work to fill large shops operating on a manufacturing basis. With this contract on hand we were enabled to prepare for it on a manufacturing basis, but it is evident that commercial business can not furnish the work to fill it. Further, although proposals were opened by the Government for materials prior to the armistice, they have since been cancelled and apparently no new work is available from that source.

"This brings us to consideration of the second method, that of doing no further work and the obligations of the Navy being definitely evaluated and paid as liquidated damages for cancellation of contract.

"Assuming work to be stopped at the present time, no further shipments of raw materials made, subcontracts canceled, and materials now on hand taken over by the Navy at cost to us plus reasonable handling charges, there would still remain certain contract

relations which if unfilled would represent a loss to the College Point Boat Corporation. The College Point Boat Corporation is in a position to fulfill the requirements of the contract, and certain overhead expenses would be borne by this contract and certain profits made as shown by Schedule A. The Navy has virtually contracted for or leased certain output, which is the total output of the College Point Boat Corporation in this class of work, capacity having been expanded to six times its previous normal size for the express purpose of executing this contract. A decision made by the Navy at the present time that it does not require the output contracted for or the lease that it holds does not release it from the obligations of a contract in which the other party has cared for its own obligations, stands ready to complete them, and its capacity being taken has been prevented from entering into contracts with other customers. Therefore the Navy has either one of the two proper courses open—to continue with all the provisions of the contract, accepting deliveries of materials in accordance with it and making payments therefor, or to make such payments to the College Point Boat Corporation as will equal the expenses the corporation would have to bear, and the profit which would have arisen from the fulfillment of the contract.

"Since under the latter course it may be said that contingencies might have arisen which would have affected the anticipated profit, [fol. 37] certain allowance should be made in the form of a reserve for contingencies, which will guarantee the net profit stated. This can perhaps be best done by taking the cost of having the profit insured as a definite sum, against all contingencies, and the amount of the premium to be paid for such insurance deducted from the gross expected profit, giving a net profit which could not but have been made.

"Under this same course it will also be seen that certain overhead expenses will not occur at all if no work is done on the contract, while others will go on whether or not production continues. In schedule (1) the various overhead charges have been classified into these two groups, and it will be apparent that if no work is done the Navy can not be asked to be responsible for the expenses which were not incurred.

With the above two paragraphs in mind we may take figures from Schedule A as follows:

| | |
|---|---|
| 9 by 9 mats: | |
| Indirect overhead, 6.55 × 1,000 | 6,550.00 |
| Profit, 69.830 × 1,000 | 69,830.00 |
| 12 by 12 mats: | |
| Indirect overhead, 6.55 × 1,000 | 6,550.00 |
| Profit, 85.480 × 1,000 | 85,480.00 |
| Gross profit and incurred expense | 168,410.00 |
| Less quoted insurance premium | 16,633.29 |
| Net liquidated damages | 151,776.71 |

SCHEDULE A

"Complete synopsis of estimated costs; based on prices contracted for materials, hand labor task with full bonus, estimated average riggers' time, and overhead as per Schedule 1. Overhead has been divided into direct costs, which would be eliminated if no work was done, and into indirect costs, which are unchanged by work not being done.

| | 9 by 9 | 12 by 12 |
|---|---|---|
| Labor, cutting | $0.04 | $0.06 |
| Machine sewing | 1.11 | 1.53 |
| Hand Sewing | 27.80 | 44.17 |
| Rigging | 3.20 | 3.20 |
| Total labor | 32.15 | 48.96 |
| Total material | 162.675 | 168.665 |
| | 194.825 | 217.625 |
| Direct overhead | 21.345 | 21.345 |
| | 226.170 | 238.970 |
| Indirect overhead | 6.550 | 6.550 |
| | 232.720 | 245.520 |
| Profit | 69.830 | 85.480 |
| | 302.55 | 331.00 |
| Freight allowed | 3.65 | 4.00 |
| Contract price | 306.20 | 335.00 |

[fol. 38] "It will be seen by the schedule that profits are very carefully figured and are as nearly liquidated and known as anything in the future can be since the supplies of raw materials, the most uncertain item, are contracted for. The corporation feels that it is fully entitled to the entire profits stated, for the reason that it took the risk of making a less profit or none whatever when it made its bid and has since secured the profit by its own diligent and capable efforts. Attention is invited to the fact that the proposals on this contract were opened three several times and that this corporation was low at each opening, and at the final opening the next bidder was approximately $120,000 above us, and the highest bidder $400,000 above us, on the basis of the total quantity, so that by the foresight and courage of this corporation in taking the contract at a figure very much lower than any other bidder was willing to consider, a very great saving has already, and in any event, been made to the Navy Department. The department is respectfully invited

to consider the situation on cancellation if the contract had been awarded elsewhere. Having voluntarily in the beginning accepted a much less profit than others might have had, we feel that we are entitled to retain that profit so far as it is a matter of certainty when the contract is liquidated or canceled.

"We submit therefore the only proposition which appears fair and equitable to both parties under the circumstances, namely, that the liquidated damages for cancellation of this contract be determined in the manner shown in the second preceding paragraph, and inasmuch as due to the short time available for making up these figures they are necessarily only approximate, we invite accurate confirmation by your representative of the exact cost figures from our records. We feel, however, that the figures given are substantially correct, and would be willing to fix the liquidated damages at the figure stated above of $151,776.71 in order to settle the question without further delay, subject, of course, to your approval.

"Attached to and forming part of the foregoing proposition is the following list of materials which have already been received from the subcontractors, and which we request the Navy Department to buy from us at cost to us plus reasonable handling charges to us of 2 per cent of their value. We are advised by the subcontractors that they will accept cancellation of the undelivered balance of our orders, therefore we will not have to ask the Navy to accept any responsibility for undelivered materials.

* * * * * * *

"From the foreging list it will be seen that, owing to deliveries not having been made, we have a comparatively large amount of money to pay on this account in the immediate future, with no income from the contract to help us meet same, and request that if this meet with the favorable consideration of the Navy Department this amount be paid us on account without awaiting decision in the matter of liquidated damages."

VI

On February 10, 1919, an agreement was entered into between the plaintiff and the defendant by which the defendant purchased and took over from plaintiff, at the cost thereof to plaintiff, $44,066.07 [fol. 39] worth of materials which had been purchased by and delivered to plaintiff for use in the performance of its said contract, on orders for which the plaintiff could not procure cancellation. A copy of said agreement is annexed to the plaintiff's petition as a part of Exhibit A, and is by this reference thereto made a part of these findings of fact.

VII

Under date of February 26, 1919, the Paymaster General of the Navy wrote the plaintiff as follows:

"Subject: Contract 42877; collision mats; regarding cancellation; adjustment.

"SIRS: By reason of the changed conditions of the country due to the signing of the armistice, the public interests demanded that cancellation be effected with respect to the material as called for under contract 42877, for the reason that the same were no longer needed by the Navy.

"Notice to discontinue all work under the contract and incur no further obligations was sent your company prior to any manufacturing work having been done on the collision mats as called for by the contract. The only work done under the contract has been the purchasing of the necessary material with which to prosecute the contract to completion. Some of this material had already arrived at your works, while other quantities were under commitment orders.

"The Navy has already agreed to take off your hands all material which could not be canceled from your subcontractors and to pay the invoice cost of this material to you; and, in fact, supplementary contract February 10, 1919, provided for the reimbursement to you in the sum of $44,031.16, for the major part of the material; and the Navy also agrees to pay you the sum of $10,231.80, covering the steel wire and steel rope purchased by you from the Hazard Manufacturing Co., cancellation of which subcontract could not be effected.

"From investigation at your plant it is also believed that the sum of $1,900 is properly allowable for plant rearrangement, which rearrangement was made.

"In addition to the foregoing, be advised that the Navy does not feel that it can consider the item of your claim with respect to your estimated unearned profits, which is shown on your claim to be $182,420.

"In the interests of an amicable adjustment of the whole matter the Navy has proceeded with respect to this item on the basis of what would be considered a fair allowance of profit had the work proceeded under a Navy order, and it has been found that a profit allowance of $32,120 would be a fair amount for the entire contract, as this sum would represent a return of 20 per cent on invested capital used over a production period of nine months.

"Considering the matter from this angle, and considering that the value of the material purchased is a certain per cent of the total cost of completion, it is proposed to allow you that per cent of $32,120 as additional sum to the sums as previously mentioned.

"The ratio is about 12.06 per cent, and therefore 12.06 per cent of the profit allowance of $32,120 would make $3,873.67 properly allowable.

[fol. 40] "By way of recapitulation, therefore, the Navy will allow the following:

| | |
|---|---|
| Cost of material purchased | $54,262.96 |
| Reasonable handling charges thereon at 2 per cent | 1,085.26 |
| Allowance for plant rearrangement | 1,900.00 |
| Profit allowance on 12.06 per cent of total contract | 3,873.67 |
| Total | 61,121.89 |

"The foregoing is submitted after careful consideration of all the circumstances in the case, and is forwarded for your consideration prior to submitting the same to the Secretary of the Navy for approval.

"You are advised that no settlement is effective until the Secretary has so approved, but it is believed by those handling this matter that such a suggested settlement can reasonably be expected to receive approval."

Plaintiff refused this offer of settlement, claiming a right to prospective profits, but agreed to accept payment for the cost of the materials purchased for the work with the understanding that it would not impair its right to prosecute and recover its claim for profits.

VIII

Under an agreement between the plaintiff and the defendants, of date June 30, 1919, the defendant purchased from the plaintiff, and subsequently paid for at cost to plaintiff, $10,225.60 worth of additional material which had been purchased by plaintiff for the contract work on orders for which plaintiff could not procure cancellation. This material had not yet been shipped to plaintiff and was therefore subsequently delivered by the manufacturer direct to the defendant without being handled by the plaintiff. A copy of said agreement of June 30, 1919, is annexed to the plaintiff's petition as a part of Exhibit A, and is by this reference made a part of these findings of fact.

IX

A reasonable allowance for the work and expense of purchasing the $44,066.07 worth of materials purchased by and delivered to the plaintiff, as shown by Finding VI, is $881.32; and a reasonable allowance for the work and expense of contracting for the remaining $108,990.53 worth of the materials contracted for by the plaintiff but not delivered to plaintiff is $1,089.90.

X

The cost to the plaintiff of the manufacture and delivery of said 2,000 collision mats to the Government in accordance with the requirements of the contract would have been approximately $475,890, and if plaintiff be entitled to prospective profits on the contract work the amount of such profits it would be entitled to recover, after allow-

ing for its release from the care and responsibility which would have attended a full performance of the contract, would be $123,980.

[fol. 41]

XI

Prior to the negotiations for cancellation of said contract and the suspension by plaintiff of operation thereunder, the plaintiff incurred an expense of $1,900 in rearranging and enlarging its plant, exclusive of the cost of additional machinery, and also an expense of $641.20 as premium on its contract bond. These expenses were necessary for and in connection with a performance of the contract, and were not necessary for the plaintiff's business outside of said contract.

A loss of $600 was sustained by the plaintiff through depreciation of machinery purchased by it for performance of said contract, and which, by reason of the nonperformance of the contract, was not needed by it.

XII

The plaintiff was ready, willing, and able to go on with and complete the contract work. After the plaintiff's request of December 3, 1918, for the canvas which was to be furnished by the Government, no demand or request, either by the plaintiff or by the defendant, appears to have been made for the performance of the contract work, and no protest or complaint appears to have been made by either party on account of the suspension and nonperformance of the work.

XIII

The plaintiff has received no payments from defendant on account of its said contract other than the payments to plaintiff for materials in accordance with the said agreements of February 10 and June 30, 1919, set forth in Findings VI and VIII.

The Navy Department never tendered, nor did plaintiff demand, 75 per cent of the amount offered by the department in settlement in its letter of February 26, 1919, to plaintiff.

Conclusion of Law

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the plaintiff is entitled to recover the sum of $881.32 and $1,089.90 shown by Finding IX, and $1.900, $641.20, and $600 shown by Finding XI, an aggregate of $5,112.42.

It is therefore ordered and adjudged that the plaintiff recover of and from the United States the sum of five thousand, one hundred and twelve dollars and forty-two cents ($5,112.42).

## Opinion

Booth, *Judge,* delivered the opinion of the court.

This case has been before the court heretofore. On December 4, 1921, a judgment for $20,112.42 was awarded the plaintiff in an opinion on that date announced. On December 16, 1921, the court, of its own motion, set aside an order overruling a motion for a new trial. On January 16, 1922, the court filed an order allowing new trial, vacating and setting aside its former judgment, withdrawing the findings, and remanding the case to the calendar for further proceedings. The case is now here in pursuance of the last-mentioned order.

The plaintiff on October 25, 1918, entered into a written contract with the Navy Department to manufacture and deliver 2,000 collision mats. The defendant was to furnish all the canvas for their manufacture and to pay for the total quantity when delivered the [fol. 42] sum of $641,200. The plaintiff prepared for the execution of the contract, purchased and committed itself by contract to purchase the necessary materials, enlarged its plant, and did all it could be reasonably expected to do to proceed immediately to perform its agreement. It never did, however, make or deliver a single mat. On December 3, 1918, it requested the defendant to furnish the necessary quantity of canvas, as it had agreed to do, and the defendant did promise to do so. Instead of furnishing the canvas, however, the defendant requested a conference with the plaintiff looking toward an amicable agreement for a cancellation of the contract, the armistice having intervened and the defendant not wanting the mats. The defendant at this time asked the plaintiff to cease operations under the contract, and the plaintiff acceded thereto. On December 6, 1918, the plaintiff submitted in writing its proposal of terms of compromise. It is set forth in Finding V.

On February 10, 1919, the parties to the original contract agreed upon a supplementary contract, by the terms of which the defendant took over and paid for all materials which plaintiff had committed itself by subcontracts to purchase in order to perform the original contract and which the plaintiff had not been able to cancel. This was a mutual arrangement between the parties, and can have no other significance than a voluntary assent to the cancellation of the original contract. The plaintiff by this agreement put it beyond its power to comply with the original contract, disposed of all materials not on hand, and allowed the defendant to acquire in its stead and assume for it full responsibility for all outstanding obligations which it had been unable to escape by reason of the contractual commitments for materials. This agreement, taken in connection with the one of June 30, 1919, of similar import, covered all outstanding obligations for contracted material and resulted in the payment by the defendant of the contract price for all of said material and the delivery of the same to the defendant.

On February 26, 1919, the defendant outlined in a written statement its final proposition with reference to the adjustment and settle-

ment of all outstanding obligations not covered in previous agreements resulting from the cancellation of the original contract. This statement we set out in haec verba in Finding VII. The plaintiff accepted the terms of this proposition in all its detail except the item of anticipated profits. This single item it declined to accept, contending for a vastly greater allowance in this one respect. Therefore, we are in this case primarily concerned with this single issue. As to all others, with some rather minor exceptions, the parties have concluded their differences by contract.

The recent case of the Russell Motor Car Co. v. United States, 57 C. Cls. 464, decided by the Supreme Court April 9, 1923, we think disposes of this issue, and in our opinion disposes of it irrespective of mutual agreements following or preceding cancellation, wherein the item of anticipated profits is left open for decision. That they are not recoverable under the circumstances herein narrated seems obvious. The Supreme Court said, in disposing of the question:

"This contention confuses the measure of damages for breach of contract with the rule of just compensation for the lawful taking of [fol. 43] property by the power of eminent domain. In fixing just compensation the court must consider the value of the contract at the time of its cancellation, not what it would have produced by way of profits for the car company if it had been fully performed. It is evident that no prudent person desiring to acquire this contract would have paid for it the full amount which could be realized upon completion, leaving no chance of return to himself upon the investment or for the risk and labor incident to its performance. The contract, we must assume, was entered into with the prospect of its cancellation in view, since the statute was binding and must be read into the contract. The possible loss of profits, therefore, must be regarded as within the contemplation of the parties. The lower court was right in refusing to allow anticipated profits, and there being nothing in the findings to justify the contrary, we must accept the amount fixed on the basis of just compensation as adequate."

As to the other items of expense which the plaintiff incurred, we, in a former opinion, gave judgment therefor. Judgment was awarded upon the only proof in the record then, as it is now, supporting an allowance predicated upon just compensation. We still believe they are allowable and adopt our former comments with respect to the same, as follows:

"The plaintiff rearranged and enlarged its plant for the exclusive purpose of performing this contract. The proof shows it to have cost $1,900, an amount clearly allowable. An expense of $641.20 was incurred as premium paid for its contract bond. This, too, is allowable.

"The plaintiff purchased a quantity of new machinery to meet the emergencies of this particular contract. It did not otherwise re-

quire the machinery, and suffered a proven loss of $600 depreciation thereon. This item will be included in the damages awarded.

"The plaintiff purchased and had delivered to it $44,066.07 worth of materials. In acquiring and handling said materials it is entitled to a reasonable charge. This could not be done free of expense and the defendant conceded in its proffered offer of settlement two (2) per cent of the amount would be reasonable. This, amounting to $881.32, we think allowable. In addition to this, the plaintiff had outstanding subcontracts for material amounting to $108,990.53. All save one of these contracts were cancelled by the plaintiff and the material was not delivered, and hence not handled, but the expense incident to its purchase had been incurred and should be allowed. It was evidently not so expensive as the item above, and a reasonable allowance therefor would, in our opinion, be 1 per centum of the total amount, or $1,089.90."

We have amended the findings and given in Finding X our judgment of the full amount of anticipated profits the plaintiff would have earned if allowed to complete the contract. The former opinion of the court is withdrawn, and new findings this day filed, awarding judgment to the plaintiff in the sum of $5,112.42.

It is so ordered.

Graham, Judge; Hay, Judge; Downey, Judge, and Campbell, Chief Justice, concur.

[fol. 44] IN THE COURT OF CLAIMS

VII. JUDGMENT OF THE COURT

At a Court of Claims held in the City of Washington on the Twenty-first day of May, A. D., 1923, judgment was ordered to be entered as follows:

The Court, upon due consideration of the premises, find in favor of the plantiff, and do order, adjudge and decree that the plaintiff, as aforesaid, is entitled to recover and shall have and recover of and from the United States the sum of Five thousand, one hundred and twelve dollars and forty-two cents ($5,112.42).

By the Court.

IN THE COURT OF CLAIMS

VIII. PLAINTIFF'S APPLICATION FOR AND ORDER ALLOWING APPEAL.—Filed June 25, 1923

Now comes the plaintiff, College Point Boat Corporation, by its attorney of record, Bynum E. Hinton, on this 20th day of June, 1923, and makes application for and gives notice of appeal to the Supreme Court of the United States from the judgment rendered in the above entitled cause on May 21, 1923.

Bynum E. Hinton, Attorney for Plaintiff.

[File endorsement omitted.]

Ordered: That the above appeal be allowed as prayed for.

By the Court.

June 25, 1923.

[fol. 45] COURT OF CLAIMS OF THE UNITED STATES

[Title omitted]

CLERK'S CERTIFICATE

I, F. C. Kleinschmidt, Assistant Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the argument and submission of case; of the findings of fact, conclusion of law and opinion of the court by Booth, J.; of the judgment of the court; of the plaintiff's application for an appeal to the Supreme Court of the United States and of the order of court allowing said appeal.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington City this Twenty-ninth day of June, A. D., 1923.

F. C. Kleinschmidt, Assistant Clerk Court of Claims. (Seal of Court of Claims.)

Endorsed on cover: File No. 29,751. Court of Claims. Term No. 441. College Point Boat Corporation, appellant, vs. The United States. Filed July 18th, 1923. File No. 29,751.

## CONTENTS.



## AUTHORITIES CITED.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1924.

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No 121.

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COLLEGE POINT BOAT CORPORATION, *Appellant*,

*vs.*

THE UNITED STATES.

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## I. THE FACTS.

This case is before the Court on appeal from the judgment of the Court of Claims entered May 21, 1923, in favor of the appellant in the sum of $5,112.42. The Court below found as a fact that if the appellant

> "be entitled to prospective profits on the contract work the amount of such profits it would be entitled to recover, after allowing for its release from the care and responsibility which would have attended a full performance of the contract, would be $123,980.00." (Finding X, R. pp. 28-29.)

The Court below found as a conclusion of law that the appellant was only entitled to recover the remainder

of its actual expenses, viz., $5,112.42; holding that the decision of this Court in the Russell Motor Car case, 261 U. S. 514, 67 L. Ed. 788, precludes an allowance for the proven prospective profits.

The Court below proceeded on the theory that there *had been a cancellation* of this contract. (See opinion R. p. 30.) This is not the fact, as will appear from an examination of the findings of facts as made by the Court, and the correspondence and agreements between the parties included therein. There were defaults and breaches by defendant but no exercise or attempted exercise of a right of cancellation of the contract.

(a) *Contract Was NOT Cancelled.*

Under date of October 25, 1918, the plaintiff entered into a contract with the United States, represented by the Paymaster General of the Navy, to furnish the Navy Department 2,000 collision mats at an agreed price of $641,200.00. The necessary canvas to be used in making the collision mats was to be furnished by the defendant within thirty days (Contract, R. p. 11) (Finding IV, R. p. 22), and the completed collision mats were to be delivered within 240 days from date of contract, to wit, June 22, 1919. (Contract, R. p. 10.) The Government failed to furnish any canvas by November 25, 1918 (30 days from date of contract) and on or about December 3, 1918, the claimant verbally requested the defendant to furnish the canvas, and although defendant's officers promised to expedite the furnishing of it, the said canvas for the said mats was never furnished (Finding IV, R. p. 22). On or about December 6, 1918, at a conference between the officers of the plaintiff and the defendant, claimant was in-

formed that on account of the signing of the armistice and the *probable* early termination of the war, the mats called for by the contract would *probably* not be needed, and the department therefore *desired to negotiate for* the cancellation of the contract. At this conference defendant's officers suggested plaintiff stop *operation* and submit a proposition as to the basis upon which a cancellation of the contract *would* be *satisfactory* to the plaintiff. (Finding IV, R. p. 22.)

Following said conference of December 6, 1918, and the stoppage by the plaintiff of operation for performance of said contract and after taking these matters up with the different subcontractors, plaintiff under date of December 30, 1918, wrote the Navy Department, the opening paragraph of which letter was as follows:

> "Replying to your request as to on what basis we will accept cancellation or reduction in quantity of contract No. 42877, for 2,000 collision mats, aggregating $641,200.00, we submit the following proposition for your approval." (Finding V, R. p. 22.)

Appellant outlined in much detail a confirmation of the conference of December 6, 1918; what it was possible to do with its subcontractors, and what it was willing to do; and particularly insisted on receiving its prospective profits. (Finding V, R. pp. 22-26.)

Thereafter, before making any reply to appellant's proposition of December 30, 1918, the Navy Department drew up in its own language a supplemental agreement, dated February 10, 1919, in which it recited among other things—

"Whereas by reason of the changed conditions of the country, due to the signing of the armistice, it has been found necessary in the public interest to *consider* cancelling the entire contract;

Whereas the contractor has purchased certain quantities of material for this contract which it has become necessary for the Navy to take from the contractor;

Therefore, etc." (R. p. 17.)

This supplemental agreement provided for the payment and there was paid to claimant the sum of $44,066.07, being the *full* value of the materials listed. Also the two bonding companies who were guarantors on the original contract bond, were expressly required to consent to this amendment to the original contract, as follows:

"We, United States Guaranty Company and the Chicago Bonding & Insurance Company, as surety for College Point Boat Corporation, hereby concur in the above amendment to contract 42,877, as applying to bond of $32,100.00 each, executed by us under date of October 25, 1918, and agree to continue bond in force." (R. p. 19.) (Finding VI, R. p. 26.)

Up to this time, namely, February 10, 1919, no reply had been made to appellant's letter of December 30, 1918, in which was stated the basis on which it would accept a cancellation. Also the officials of the Navy Department handling the matter expressly showed that they had not cancelled the contract but were merely "*considering cancelling*" the same. Furthermore, the Government in its form of supplemental agreement required that the *original bond* in the *original penal sum still be held in force and effect.*

Thereafter, on February 26, 1919, the Paymaster General of the Navy wrote the appellant (Finding VII, R. p. 26) emphasizing that notice had been given to discontinue the *work*, and indicating that the public interest demanded that cancellation be effected; but in no place stated that cancellation was made or had been authorized by the Secretary of the Navy. In the concluding paragraphs he tendered a settlement in which a prospective profit allowance was offered as one of the items, and requested appellant's approval of the same before submitting the proposition to the Secretary of the Navy. Settlement was not consummated on the basis of the proposition contained in the Paymaster General's letter of February 26, 1919, and subsequently thereafter, on June 30, 1919, eight days after the original contract was to be completed (June 22, 1919), the parties entered into another supplemental agreement prepared by the defendant, reciting again—

> "Whereas by reason of the changed conditions of the country, due to the signing of the armistice, it has been found necessary in the public interest *to consider* cancelling the entire contract." (Italics ours.) (R. pp. 19-20.) (Finding VIII, R. p. 28.)

In this supplemental agreement a clause was inserted releasing the Navy Department from any liability whatsoever growing out of a claim of a particular subcontractor whose material was being paid for and of the claims of any other subcontractor, but expressly reserving to the appellant the right to pursue any remedy it may have in its *own* right, so long as such right was not connected with a claim of a subcontractor, concluding with the express stipulation that

> "All other conditions of the original contract No. 42887 to remain as originally specified." (R. p. 20.) (Finding VIII, R. p. 28.)

As in the case of the supplemental agreement of February 10, 1919, the Government required, and there was executed at the bottom of this supplemental agreement, under date July 16, 1919, the following consent of sureties:

> "We, United States Guaranty Company and Chicago Bonding & Insurance Company as surety or sureties for the above named contractor, hereby consent and agree this 16th day of July, 1919, to the amendments covered by the supplementary agreement relating to contract numbered as above and hereby expressly agree that our bond previously executed, *guaranteeing the performance and fulfillment of the original contract. shall continue in full force and effect notwithstanding such amendments.*" (Italics ours.) (R. p. 21.)

It will thus be seen that throughout the negotiations and as late as July 16, 1919, the contracting officer, the Paymaster General of the Navy, the only one who had taken any steps with respect to this contract, was careful to expressly state that, except as modified, the contract was still in force, and the bonding companies were required to consent to these modifications and agree that they each remained bound in the penal amounts of $32,100.00 or a total of $64,200.00 (amount of original bond, R. p. 16), to guarantee *full performance of the original contract, notwithstanding the amendments.*

The mere recital of these events and contract provisions, we submit, clearly shows that the trial court was in error in concluding that these agreements "can

have no other significance than a voluntary assent to the cancellation of the original contract." When the Navy Department was so careful to avoid cancellation and reiterating in every instrument that the contract was not cancelled, but still remained in force, obviously there was no cancellation to which claimant could assent, and no foundation in fact, therefore, for the assumption of the trial court that these negotiations amounted to an assent on the part of the claimant to cancellation.

The argument in the opinion of the trial court that these agreements put it beyond claimant's power to comply with the original contract is not well founded. Had this been so, obviously claimant and his sureties would not have signed the supplemental contracts agreeing that the original obligations still remained in force. Claimant had been able to purchase the materials quite promptly in the first instance, and could of course have done so again had the Government furnished the canvas and permitted them to proceed with the work. Furthermore, the trial court in Finding XII (R. p. 29) finds as a fact that

> "The plaintiff was ready, willing and able to go on with and complete the contract work."

Furthermore, there is not a scintilla of evidence in the record that the Secretary of the Navy ever took any action or authorized any action with respect to the cancellation of this contract. Neither is there any evidence that any other official took any action canceling or purporting to cancel. It is important to note in this connection that the Paymaster General in his letter of February 26, 1919, suggesting a basis for cancellation,

specifically disclaimed any authority in himself to make any cancellation settlement, stating (Finding VII, R. p. 28)—

> "The foregoing is submitted after careful consideration of all the circumstances in the case and is forwarded for your consideration prior to submitting the same to the *Secretary of the Navy for approval.* You are advised that *no settlement is effective until the Secretary has so approved.*" (Italics ours.)

The parties were never able to get together on any settlement so nothing was ever presented to the Secretary for his approval or authorization and the contract was never cancelled.

(b) *No Tender of 75% of Amount Due.*

The Navy Department never tendered 75% of the amount offered to the plaintiff in its letter of February 26, 1919, nor 75% of any other amount. (Finding XIII, R. p. 29.)

(c) *Appellee in Default Before Cancellation Suggested.*

It is also to be remembered that on and after November 25, 1918, the date when the defendant was required to furnish the necessary canvas, the defendant was in default under one of the obligations assumed by it in the contract. The delivery of the canvas was of the essence of the contract, for the reason that deliveries of the completed collision mats were not predicated on a certain number of days after receipt of canvas, but on a certain number of days after date of contract. The first deliveries were recognized, however,

as impossible to be made until receipt of canvas, and it was expressly provided that they were to *begin* within forty days from receipt of canvas but deliveries were to be *completed* within 240 days from *date of contract.* (R. top p. 10.) Accordingly, therefore, although the appellant's officers on December 3, 1918, made an honest effort to get the Government to deliver the necessary canvas, and although it was promised, it was never made and the default continued. Therefore, when the parties went in conference on December 6, 1918, the Government officials, aware of this default, desired to "negotiate cancellation" and did not demand one of right, and accordingly appellee's officers *suggested* that appellant submit a proposition as to the basis upon which cancellation *would be satisfactory to it.* (Finding IV, R. p. 22.)

## II. POINTS AND AUTHORITIES.

### (a) *Right of Cancellation in Defendant Does Not Relieve it From Damages for Breach.*

The fact of the mere presence in a contract of a right of cancellation by one party, does not relieve that party from liability for breach of the contract.

In 13 C. J., p. 606, Sec. 631, it is stated:

> "The presence of such a provision has no effect on the binding obligations of the contract as long as the parties continue to act under it before revoking or terminating it." Citing Kenny v. Knight, 119 Fed. 475.

It would be a travesty on justice to hold that because of the *possibility* that a party might at some future

time exercise the right to cancel, that it can escape liability for defaults and breaches. In Kenny vs. Knight, *supra*, the court said:

> "Even were we of the opinion that the written contract showed upon its face that it was terminable at the will of either party, or upon reasonable notice, it would not follow that the agreements therein contained would not be obligatory upon the parties so long as they continued to act under such contract, before revoking or terminating it."

Also the mere presence in a contract of the right of cancellation, *if not exercised in accordance with that right*, does not affect the measure of damages for breach. The injured party in such a case is entitled to recover his proven prospective profits. Philadelphia, Wilmington & Baltimore R. R. Co. vs. Howard, 13 How. 307. In that case the contract between Howard and the Railroad Company gave to the railroad a right of cancellation if in its (the railroad's) opinion the contractor was not making due progress, or was irregular or negligent, and it was expressly provided that no appeal from the opinion or decision of the Railroad Company as to such determination could be made. In fact, Howard by the terms of the contract stated that he released all right to except to or question the same in any place under any circumstances whatever. The contract was cancelled and Howard attempted to show that it was terminated because the Railroad Company had an opportunity to let the contract elsewhere for less money, and hence contended that the termination was, as to his rights, unlawful. The Railroad Company denied this, but contended that even if that were found to be so, by reason of this right

of cancellation, only the actual damages, if any, could be recovered, and no prospective profits. This Court held to the contrary, and speaking through Mr. Justice Curtis, at page 344, said:

> "It is insisted that only actual damages and not profits were in that event to be inquired into and allowed by the jury. It must be admitted that actual damages were all that could lawfully be given in an action of covenant, even if the company had been guilty of fraud. But it by no means follows that profits are not to be allowed, understanding, as we must, the term 'profits' in this instruction as meaning the gain which the plaintiff would have made if it had been permitted to complete its contract. Actual damages, clearly include the direct and actual loss which the plaintiff sustains. * * * And in case of a *contract like this,* that loss is, among other things, the difference between the cost of doing the work and the price to be paid for it. This difference is the inducement and real consideration which causes the contractor to enter into the contract. For this he expends his time, exerts his skill, uses his capital, assumes the risks which attend the enterprise, and to deprive him of it when the other party has *broken* the contract and *unlawfully* put an end to the work would be unjust. There is no rule of law which requires us to inflict this injustice." (Italics ours.)

It will thus be seen that the mere presence or absence of a right of cancellation in the contract in no way affects the legal measure of damages for breach or default.

(b) *Party in Default Cannot Exercise Right of Cancellation.*

The law is generally well settled that a party who is himself in default of performance cannot rescind. 13 C. J. 614, Sec. 662. It is also well established that a party cannot cancel a contract, even though a right to do so is expressly written in the contract, after a liability has occurred. This is so even where the extent of the liability is not then determinable. In other words, such right of cancellation can only be exercised when the party himself is free from liability under the contract at the time of such cancellation. This is obviously as it should be, as any other rule would permit one party to the contract to greatly damage the other, and then with a sweep of the pen relieve himself of liability therefor by simply cancelling the contract. This proposition is very aptly stated and illustrated in Black on Recision and Cancellation, Sec. 480:

> "A provision in an insurance policy giving the insurer company the right of cancellation *though unrestricted to the reasons to which it may be exercised*, does not give the right to cancel after a liability of the company has occurred. * * * Of course the company cannot cancel the policy after a loss has occurred, *or after events have occurred which initiate a loss, the extent of which is not at present determinable.* * * * And an accident policy cannot be terminated at will by the insurer notwithstanding a reservation of a right to do so, after the insured has sustained an injury. * * * Citing Jones vs. Commercial Travelers Mutual Accident Association, 114 N. Y. Sup. 589." (Italics ours.)

(c) *This Case not Controlled by Decision in Russell Motor Car Company.*

If the instant contract has not been cancelled, which fact is unquestionably shown by the supplementary agreements hereinbefore referred to, no question of the application of the Act of June 15, 1917, is involved. Therefore, the holding of this court regarding the application of that act to Government contracts (Russell Motor Car Co., *supra*) is not decisive of the case at bar.

Further, in the Russell Motor Car case, *supra*, the Navy Department at first, under date of November 18, 1918, expressed a desire for the reduction and eventual stoppage of the production of materials under the contract. Later, however on November 23, 1918, the company was notified "that the Secretary had authorized the cancellation of contract 1498," and advised that "a just and fair settlement would be made as provided by contract and in accordance with the statute covering such cases." No such facts are present here. After extended negotiations in the Russell Motor Car case, "the Secretary finally fixed the sum of $444,847.68 as just compensation for the cancellation of the contract." No such action here. "Seventy-five per cent of this amount was paid and accepted by the company." No such action here. Also in the findings of fact from the Court of Claims in the Russell Motor Car Company case, it is expressly shown that the offer of settlement from the Navy Department in that case did *not* include an item of profit, whereas in the case at bar the written record shows expressly that the defendant conceded the allowance of profits as part of plaintiff's claim. (Finding VII, R. p. 28.) The failure in the case at bar to

consummate an agreement with reference to profit was due entirely to the inability of the parties to agree upon an amount.

There was no *taking* of this contract by the government. The stoppage of the physical work had to do with the subject-matter and could not constitute a cancellation or a taking of the contract, for as was stated by Mr. Justice Sutherland in Omnia Commercial Company vs. U. S., 261 U. S. 502, 67 L. ed. 773:

> "Parties and a subject-matter are necessary to the existence of a contract, but neither constitutes any part of it—a contract consists in the agreement and obligation to perform."

Certainly the agreement and the obligation to perform in the instant case were not cancelled, but were expressly kept intact. This was done by the supplementary agreements of February 10, 1919, and June 30, 1919, and consents of sureties hereinbefore referred to. The agreement and the obligation to perform were not taken by the Government. The supplementary agreements expressly show that the contract and obligation to perform were expressly reserved.

## III. CONCLUSION.

Accordingly, therefore, when the negotiations started on December 6, 1918, one party to this contract, the Government, was in default, and was desirous of settling its obligations as cheaply as possible. The fact that the Government did not need any more of the collision mats, of itself, without an act from the Secretary or some other authorized official cancelling the contract, could not affect the contractual obligations of the parties. Not only is there an absence of

any such act of cancellation or even attempt at cancellation, but throughout the negotiations, including the last supplemental agreement dated June 30, 1919, and the consent of sureties dated July 16, 1919, the parties were very careful to expressly preserve and continue the original contract relations, together with the bonds to cover. The defendant, however, did not furnish the required canvas in accordance with its agreement, without which it was impossible for claimant to complete its contract; and it is perfectly clear from the facts recited in the findings that subsequent to the signing of the armistice the defendant had absolutely no intention of furnishing any canvas for the completion of the mats, or to permit the plaintiff to perform its contract. The result of this breach of contract by the defendant was to deprive claimant of the realization of the profit which it had in the contract, which has been proven and found by the Court of Claims to be $123,980.00. The contract not having been cancelled and just compensation paid or tendered in accordance with the Act of June 15, 1917, claimant had no other recourse than to file suit in the Court of Claims for breach of contract, which it accordingly did on November 1st, 1919.

We believe it abundantly appear. from the facts found by the Court of Claims that there was no exercise or attempted exercise of any right of cancellation in this case, but a plain breach of contract. Where one party to an agreement declines to perform the condition upon which performance of the contract by the opposite party depends, the party injured has his remedy, as is clearly stated in the United States vs. Speed, 8 Wall. 77. The instant case is plainly one for damages for breach of contract and not compensation due to

exercise of a right of cancellation, as there was clearly no exercise or attempted exercise of such right. Therefore the recognized authorities of this Court from the Speed case, *supra,* down to and through the case of Purcell Envelope Company, 249 U. S. 313, hold that the appellant herein is entitled to the proven prospective profits, which are found by the Court of Claims in Finding X to be $123,980.00. It is respectfully requested, therefore, that the judgment of the Court below be reversed and the cause remanded with instructions that judgment be entered for this amount, plus $5,112.42, as allowed by that court, or a total of $129,092.42.

Respectfully submitted,

BYNUM E. HINTON,
*Attorney for Appellant.*

# In the Supreme Court of the United States

OCTOBER TERM, 1924

COLLEGE POINT BOAT CORPORATION,
Appellant
*v.*
THE UNITED STATES
} No. 121

*APPEAL FROM THE COURT OF CLAIMS*

## BRIEF ON BEHALF OF THE UNITED STATES

### STATEMENT OF THE CASE

This is an appeal from a judgment of the Court of Claims awarding the plaintiff-appellant the sum of $5,112.42, upon findings of fact made after trial of the issues.

### THE FACTS

The plaintiff on October 25, 1918, made a contract with the Navy Department to furnish 2,000 collision mats, being a part of the equipment of ships and intended for use in stopping leaks in a ship's hull. Within less than three weeks the Armistice came and none of the mats was furnished.

On December 3, 1918, arrangement was made for a conference to be held on December 6th, and at this conference plaintiff was informed that on account of

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the signing of the Armistice and the probability of early termination of the war the mats would not be needed, and that the Department desired to negotiate with regard to a cancellation of the contract. It also suggested that plaintiff stop operations for the performance of the contract, and submit a proposition as to the basis upon which a cancellation would be satisfactory. (Fourth Finding, page 22.)

Following the conference on December 6, 1918, the plaintiff stopped operations, and on December 30th wrote to the Navy Department a proposition as the basis of a settlement. (Fifth Finding, page 22.)

On February 10, 1919, an agreement was entered into between the plaintiff and the defendant by which the defendant purchased from the plaintiff at the cost thereof to the plaintiff $44,066.07 worth of materials which had been purchased by plaintiff for use in the performance of the contract or on orders for which the plaintiff could not procure cancellation. (Sixth Finding, page 26.)

There followed further negotiations, resulting in an offer by the Navy Department to pay to the plaintiff the sum of $61,121.89, which included the $44,066.07 already mentioned. Plaintiff refused this offer, claiming a right to prospective profits, but agreed to accept payment for materials purchased with the understanding that it would not impair its right to prosecute its claim for profits. (Seventh Finding, page 28.)

Thereupon an agreement was made by which the defendant paid to the plaintiff the further sum of $10,225.60, the value of additional material which had been purchased by the plaintiff for work upon the contract.

The net result was a settlement between the parties of the entire matter, with the exception of the claim for future profits and several small items, which amount to an aggregate of $5,112.42, and for which the Court of Claims has given judgment.

The sole point to which the brief of appellant is directed is that it is entitled to recover prospective profits. The Court of Claims found them to be $123,980.00 (Tenth Finding, page 28), but refused to allow recovery therefor.

## ARGUMENT

### The plaintiff is not entitled to recover, upon cancellation of its contract, its anticipated profits

The Court of Claims held that the question of the right to recover anticipated profits was settled by this Court in the case of *Russell Motor Car Company* v. *United States* (261 U. S. 514). There is no substantial difference between that case and the case at bar. The statute involved is the same—the Act of June 15, 1917, c. 29, 40 Stat. 182—empowering the President "to modify, suspend, cancel, or requisition any existing or future contract for the building, production, or purchase of ships or material." Mr. Justice Sutherland, delivering the opinion of the Court in that case, after referring to the fact that

the public interests demanded that cancellation be effected with respect to the material as called for under Contract 42877, for the reason that the same were no longer needed by the Navy.

The plaintiff accepted the terms of this proposition, except as to the item of anticipated profits and a few minor items. These negotiations and the action taken can have no other significance than a voluntary assent to the cancellation of the original contract.

The point that no tender was ever made of 75 per cent. of the amount due in accordance with the offer of the Navy Department dated February 26, 1919, needs no serious consideration. The total amount of the offer was the sum of $61,121.89. The Findings show that prior thereto the Government had purchased and taken over from the plaintiff over $44,000 worth of materials covered by the offer, and thereafter paid the plaintiff $10,000 for additional materials, a total far in excess of 75 per cent. of the offer.

## CONCLUSION

The judgment of the Court of Claims should be affirmed.

Respectfully submitted,

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*Solicitor General.*
ALFRED A. WHEAT,
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OCTOBER, 1924.

# COLLEGE POINT BOAT CORPORATION *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 121. Argued November 17, 1924.—Decided January 19, 1925.

1. Claimant's preparations to perform its contract for furnishing supplies to the Navy were stopped as the result of steps taken by the Navy Department, for the purpose of avoiding useless production, without manifested intention to cancel the contract and without giving the notice requisite to the exercise of the unconditional right of cancellation existing under the Act of June 15, 1917, (*Russell Motor Car Co.* v. *United States*, 261 U. S. 514,) pursuant to which the contract was made. *Held*, that there was no cancellation as a matter of law, and that the stoppage of performance was an anticipatory breach. P. 15.
2. The Government's right of cancellation, under the above statute, is continuing and not lost by delay in exercising it. P. 16.
3. This continuing right of cancellation, limiting the value of the other party's right to require performance, curtails his damages for an anticipatory breach by the Government, so that prospective profits are not recoverable. *Id.*
4. There is no general rule that a party can not exercise a right to cancel a contract when himself in default. *Id.*
5. *Held*, that a default on the part of the Government was insubstantial and did not render inequitable delayed exercise of its right to cancel the contract. *Id.*
6. The right to cancel conferred by the Act of June 15, 1917, is not made dependent on a tender of 75% of the amount offered by the Government in settlement. P. 17.

58 Ct. Clms. 380, affirmed.

APPEAL from a judgment of the Court of Claims rejecting a claim for loss of profits anticipated under a contract with the United States, performance of which was stopped by the Government.

*Mr. Julian C. Hammack* and *Mr. Bynum E. Hinton*, for appellant.

The mere presence in a contract of a right of cancellation by one party, does not relieve that party from lia-

bility for breach of the contract. *Kenney* v. *Knight,* 119 Fed. 475.

Also the mere presence in a contract of the right of cancellation, if not exercised in accordance with that right, does not affect the measure of damages for breach. The injured party in such a case is entitled to recover his proven prospective profits. *Philadelphia etc. R. R. Co.* v. *Howard,* 13 How. 307.

The law is generally well settled that a party who is himself in default of performance cannot rescind. 13 Corpus Juris 614, § 662. It is also well established that a party cannot cancel a contract, even though a right to do so is expressly written in the contract, after a liability has occurred. This is so even where the extent of the liability is not then determinable. Black on Rescission and Cancellation, § 480.

As the contract has not been cancelled, no question of the application of the Act of June 15, 1917, is involved. Therefore *Russell Motor Car Co. Case,* 261 U. S. 514, is not decisive of the case at bar. That case, moreover, is otherwise clearly distinguishable on the facts.

There was no taking of this contract by the government. The stoppage of the physical work had to do with the subject-matter and could not constitute a cancellation or a taking of the contract. *Omnia Commercial Co.* v. *United States,* 261 U. S. 502.

*Mr. Alfred A. Wheat,* Special Assistant to the Attorney General, with whom *Mr. Solicitor General Beck* was on the brief, for appellee.

Mr. Justice Brandeis delivered the opinion of the Court.

On October 25, 1918, the College Point Boat Corporation agreed to manufacture for the Navy Department 2,000 collision mats. The United States agreed to pay therefor $641,200, and to supply the required canvas. On

November 11, 1918, the Armistice was signed. Soon after, the Navy Department informed the Corporation that the mats would probably not be needed, suggested that it stop operations, and asked it to submit a proposition for cancellation of the contract. This notification and request were received before the process of manufacture had been begun; but the Corporation had expended large sums in necessary preparations. Negotiations for settlement followed. They extended over nearly eight months and proved inconclusive. Without prejudice to the rights of either party, the United States made a partial settlement by taking over at cost raw materials which the Corporation had purchased or contracted for.

In November, 1919, this suit was brought in the Court of Claims to recover the further amounts claimed. The court found that, in addition to the amounts covered by the partial settlement, expenditures had been made, services rendered and charges incurred aggregating $5,112.42 in cost or value. For that amount it entered judgment. The claimant contended that the United States was under the ordinary liability of one who, having contracted for goods to be manufactured, without cause gives notice that he will not accept delivery; and that it was liable, also, for the prospective profits. *United States* v. *Speed*, 8 Wall. 77; *United States* v. *Purcell Envelope Co.*, 249 U. S. 313, 320. The court found that the Corporation was ready, willing and able to perform the contract; and that if it "be entitled to prospective profits on the contract work, the amount of such profits it would be entitled to recover, after allowing for its release from the care and responsibility which would have attended full performance of the contract, would be $123,980." As a conclusion of law, the court ruled that no part of these prospective profits was recoverable, because the United States had cancelled the contract. 58 Ct. Clms. 380. The case is here on appeal under § 242 of the Judicial Code.

There is no finding of fact that the contract was cancelled. Nor do the facts found warrant the conclusion that there was in law a cancellation before the suit was begun. The contract did not contain any clause authorizing cancellation other than for default by the plaintiff. There was no such default. The United States actually did have an unconditional right of cancellation. For the contract was made pursuant to the Act of June 15, 1917, c. 29, 40 Stat. 182. By virtue of the statutory provision, as was later held in *Russell Motor Car Co.* v. *United States*, 261 U. S. 514, the right to cancel became, by implication, one of the terms of the contract. But, so far as appears, neither party knew that the United States had such a right. The Navy Department failed to give the notice requisite to terminate the contract. Its sole objective in suggesting that preparations for the performance of the contract be stopped was to avoid useless production. The Corporation necessarily acquiesced. The parties negotiated, seeking to find a basis on which they could agree to cancel and liquidate the obligation of the Government. In the negotiations, and in the agreements which embodied the partial settlement, the Navy used language inconsistent with an intention to exercise a right of cancellation. As its efforts to procure consent to cancel proved futile, stopping the work was an anticipatory breach.

The question remains whether the measure of damages recoverable for this breach is the same as it would have been if the Government had not possessed the right of cancellation. A party to a contract who is sued for its breach may ordinarily defend on the ground that there existed, at the time, a legal excuse for nonperformance by him, although he was then ignorant of the fact.[1] He

[1] H. D. Williams Cooperage Co. *v.* Schofield, 115 Fed. 119, 121; Trinidad Asphalt Mfg. Co. *v.* Trinidad Asphalt Refining Co., 119 Fed. 134, 138.

may, likewise, justify an asserted termination, rescission, or repudiation, of a contract by proving that there was, at the time, an adequate cause, although it did not become known to him until later.[2] An unconditional right to cancel can be availed of for the purpose of terminating a contract, even after suit brought, unless some intervening change in the position of the other party renders that course inequitable. Compare *Clough* v. *London & Northwestern Ry. Co.*, L. R. 7 Exch. 26, 33 *et seq.* Ignorance of its right doubtless prevented the Navy Department from taking, shortly after the Armistice, the course which would have resulted legally in cancelling the contract at that time. But the right to cancel was not lost by mere delay in exercising it; among other reasons, because the statute conferred upon the Government also the power to suspend the contract. The right remained effective as a limitation upon the Corporation's right to have the Government accept and pay for the mats. This continuing right of cancellation, which was asserted later, in court, operated to curtail the damages recoverable. It limited the value of the plaintiff's right to require performance, and hence the amount and character of the loss for which compensation must be made. Prospective profits were not recoverable.

The Corporation contends that the United States had broken its agreement even prior to its notification to stop preparations for the performance of the contract; and that a party in default cannot exercise a right to cancel. There is no such rule of general application. The default referred to was not substantial. By the terms of the

[2] Carpenter Steel Co. *v.* Norcross, 204 Fed. 537, 539–540; Farmer *v.* First Trust Co., 246 Fed. 671, 673; E. H. Taylor, Jr., & Sons *v.* Julius Levin Co., 274 Fed. 275, 282; Lubriko Co. *v.* Wyman, 290 Fed. 12, 15; Boston Deep Sea Fishing & Ice Co. *v.* Ansell, L. R. 39 Ch. Div. 339, 352; In re London & Mediterranean Bank, Wright's Case, L. R. 7 Ch. App. 55; Baillie *v.* Kell, 4 Bing. N. C. 638, 650.

contract the United States was to furnish the canvas within thirty days, that is, on November 25. It did not do so. Two weeks before that date the Armistice had been signed. On December 3, the Corporation requested that the canvas be supplied. On December 6 it received from the Navy notice that the mats would probably not be needed. Neither these facts, nor any other found, render inequitable a delayed exercise of the right to cancel.

It is also urged that the Navy did not tender to the Corporation 75 per cent. of the amount which it offered in settlement. The right to cancel conferred by the Act of June 15, 1917, is not made dependent upon such tender. The Corporation made no demand for that amount. Moreover, for aught that appears, it has actually received a larger percentage. With the amount awarded by the lower court, it will receive full compensation.

*Affirmed.*